

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 SUMMARY ORDER
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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS
8 OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS
9 OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A
10 RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL
11 OR RES JUDICATA.
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13 At a stated term of the United States Court of Appeals for the Second Circuit, held at the United
14 States Courthouse, Foley Square, in the City of New York, on the 23rd day of September, two
15 thousand and four.
16

17 PRESENT:

18 HON. WILFRED FEINBERG
19 HON. THOMAS J. MESKILL
20 HON. BARRINGTON D. PARKER, JR.,
21 *Circuit Judges,*
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25 Yanathan Hernandez
26 *Defendant-Appellant*
27

SUMMARY ORDER
No. 04-0695-cr

28 v.
29

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31 United States of America
32 *Appellee*
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36 COUNSEL FOR APPELLEE: W.S. WILSON LEUNG, Assistant US Attorney,
37 DAVID N. KELLEY, US Attorney for the Southern
38 District of NY, GARY STEIN, Assistant US Attorney.
39 COUNSEL FOR DEFENDANT-APPELLANT: PETER TILEM, White Plains, NY.
40

41 Appeal from a judgment of the United States District Court for the Southern District of New
42 York (Chin, J.).
43

1 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND
2 DECREED that the judgment of the District Court be and it hereby is AFFIRMED.
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4 Defendant Yanathan Hernandez, raising sentencing issues, appeals from a judgment of
5 conviction entered by the United States District Court for the Southern District of New York
6 (Chin, *J.*). Following his plea of guilty to the charge of distributing, and possessing with intent
7 to distribute, approximately 73 grams of crack cocaine in violation of 21 U.S.C. §§ 812 and 841,
8 the District Court assigned him three criminal history points, rejected his contention that he was
9 entitled to “safety valve” relief provided by the Mandatory Minimum Sentencing Reform Act of
10 1994, and now codified at 18 U.S.C. § 3553(f), and by U.S.S.G. § 5C1.2(a), and sentenced him
11 principally to 120 months. Under the safety valve provision, a sentencing court must disregard
12 statutorily mandated minimum sentences if several requirements are met, including a
13 requirement that the defendant have no more than one criminal history point. *See* 18 U.S.C. §
14 3553(f).

15 The District Court concluded that Hernandez was ineligible for safety valve relief as a
16 consequence of a prior drug conviction that resulted in a Youthful Offender Adjudication (YOA)
17 under New York law and that it lacked discretion not to count this conviction in determining the
18 appropriate criminal history. Familiarity with the relevant facts, procedural history and issues
19 raised on appeal is presumed.

20 Hernandez raises three issues. First, he contends that the District Court erroneously
21 concluded that it did not have the discretion, under the Federal Sentencing Guidelines and this
22 Court’s decisions in *United States v. Matthews*, 205 F.3d 544 (2d Cir. 2002), and *United States v.*
23 *Driskell*, 277 F.3d 150 (2d Cir. 2002), to choose to omit his YOA and that he was therefore

1 improperly deprived of safety valve relief.

2 We reject this contention. The Guidelines plainly require that unexpunged convictions
3 be counted in criminal history. In *United States v. Matthews*, we held that New York’s youthful
4 offender adjudications are not considered to be “expunged sentences” under the Guidelines.
5 Shortly thereafter, we determined that a youthful offender adjudication counts as a conviction
6 when calculating criminal history under § 4A1.1 of the Guidelines. *United States v. Driskell*, 277
7 F.3d at 154-55. Section 4A1.2(d)(2)(B) directs District Court judges to “add 1 point under
8 §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant’s
9 commencement of the instant offense not covered in (A).” Therefore, the District Court correctly
10 concluded that it was required to include the youthful offender adjudication and that Hernandez
11 was not eligible for safety valve relief.

12 Secondly, Hernandez claims that the government failed to present sufficient evidence to
13 meet its burden of establishing the sentence he received for his previous conviction by a
14 preponderance of the evidence. In particular, he points out that in his presentence report his
15 felony was mischaracterized as a Class B felony (criminal sale of a controlled substance in the
16 second degree) although he was actually convicted of a Class E felony (criminal facilitation).
17 However, this argument is waived because at sentencing he conceded that the
18 mischaracterization, had no impact on his Guideline computation. See *United States v.*
19 *Rizzo*, 349 F.3d 94, 99 (2d Cir. 2003) (“[I]f a defendant fails to challenge factual matters
20 contained in the presentence report at the time of sentencing, the defendant waives the right to
21 contest them on appeal.”).

22 Finally, Hernandez argues that sentencing guideline U.S.S.G. § 4A1.2(j) violates due

1 process because it requires district courts to look to state law when determining whether a
2 sentence is expunged, resulting in disparate treatment of “similar” defendants. However, it is
3 clearly established that “[t]o sustain a federal sentencing statute against a due process challenge,
4 courts need only find that Congress had a rational basis for its choice of penalties.” *United States*
5 *v. Meskini*, 319 F.3d 88, 91 (2d Cir. 2003) (internal citations and punctuation omitted, alteration
6 in original). Since a wide variety of decisions under the Guidelines are driven by the laws of the
7 various states, it is clear to us that looking to them when analyzing youth and juvenile offenses is
8 rational. *See generally United States v. Driskell*.

9 Accordingly, the judgment of the District Court is hereby affirmed.

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11 FOR THE COURT:
12 Roseann B. MacKechnie, Clerk
13

14 By: Richard Alcantara, Deputy Clerk
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